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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 60

PAUL POE ET AL

Apellants

vs.

ABRAHAM ULLMAN, State's Attorney

Appellee

JANE DOE

Appellant

vs.

ABRAHAM ULLMAN, State's Attorney

Appellee

No. 61

C. LEE BUXTON

Appellant

vs.

ABRAHAM ULLMAN, State's Attorney

Appellee

ON APPEAL FROM THE SUPREME COURT OF ERRORS OF CONNECTICUT

BRIEF FOR APPELLEE

For Appellee:

ALBERT L. COLES,
Attorney General.

RAYMOND J. CANNON,
Assistant Attorney General.

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STATUTES INVOLVED

Statutes involved in this case are Sections 53-32 and 54-196, General Statutes of Connecticut, Revision of 1958.

Said statutes are quoted in Brief for Appellants, Pages 4 and 5.

STATEMENT OF THE CASES

The Statement of the Cases as contained in Brief for Appellants, Pages 5 through 8, is substantially correct in that such Statement paraphrases the allegations of the three complaints.

The appellants Poe and Doe brought actions seeking a declaratory judgment as to whether Sections 53-32 and 54-196 of the General Statutes of Connecticut, Revision of 1958, are in conflict with the Constitution of the United States as depriving appellants of life and liberty without due process of law. (R.pp. 1-9).

The appellant Buxton also brought an action for declaratory judgment seeking a determination as to whether said statutes were in conflict with the Constitution of the United States as depriving said appellant of property and liberty without due process of law. (R.pp. 10-14).

In said actions the appellants also sought a determination as to whether the statutes in question constituted a valid exercise of the police power of the State as to the facts related in each of said complaints.

To each of the complaints the appellee filed a demurrer. (R.pp. 14, 15). Said demurrers were sustained in the Superior Court and the appellants thereafter appealed to the Supreme Court of Errors of Connecticut, and the Opinion is contained in the Record. (R.pp. 25-34).

SUMMARY OF ARGUMENT

POINT I

The decision of the Connecticut Supreme Court of Errors (R.pp. 25-34) that Sections 53-32 and 54-196 of the General Statutes of Connecticut, Revision of 1958, should be sus-

tained on the ground that said statutes constitute a proper exercise of the police power of the State.

POINT II

The police power as exercised by the State does not deprive either (a) the rights to life and liberty of the appellants, or (b) any property rights of the appellant Buxton without due process of law.

POINT III

Comments concerning certain claims of the appellants as contained in their Brief.

ARGUMENT

POINT I

The appellee at the outset emphasizes the opinion of the Supreme Court of Errors of Connecticut (R.pp. 25-34), and two previous opinions wherein the basic issues now presented were twice considered by the Connecticut Supreme Court of Connecticut. *State v. Nelson*, 126 Conn. 412 (1940) and *Tileston v. Ullman, State's Attorney*, 129 Conn. 84 (1942). In all three cases the statute (Section 53-32, General Statutes, Revision of 1958) was upheld as within the police power of the State and, therefore, constitutional, and further that said statute permitted no exceptions.

The Nelson case involved two physicians and a nurse, namely, Dr. Roger B. Nelson, Dr. William A. Goodrich and Clara L. McTernan. Each of the defendants was arrested and charged with being an accessory to the crime of the use of contraceptive devices under Section 6246 of the General Statutes, Revision of 1930 (now Section 53-32, Revision of 1958).

The Nelson case was argued on a demurrer presenting for all practical purposes the same issues as are now presented in the instant case. The defendants claimed that the statute was unconstitutional because of the breadth of the restriction imposed in that it constituted deprivation of rights and particularly of liberties as protected by Article XIV of the Constitution of the United States. It was alleged that the doctors prescribed contraceptive measures to two married women, which prescription was allegedly necessary to preserve the general health of said married women.

In addition to the legal claims advanced by the defendants practically the same medical and sociological arguments were presented then as is now presented in appellants' brief in the present case. Connecticut Supreme Court Records and Briefs, Part 2, January Term 1940, A-144, Page 286.

The Court in the Nelson case pointed out that an exception to the statute "is negatived not only by the absolute language used originally and preserved ever since but also, signally, by its (Legislature's) repeated and recent refusals to inject an exception. At each session from 1923 to and including 1931 a bill was introduced excepting from the operation of the statute . . . use upon prescription of a physician and sale to physicians or upon their prescription, but in each instance the bill was rejected. In 1933 a bill was introduced making a similar exception but limited to cases in which, in the opinion of the physcian, 'pregnancy would be detrimental to the health of the patient or to the child of such patient'. This was amended in the House of Representatives so as to further limit the exception to married women and passed as amended but was rejected by the Senate. Upon report of a committee of conference the House reconsidered, further amended and passed the bill but no further action was taken in the Senate. In 1935 a bill similar to the original 1933 bill was introduced but not reported out by the judiciary com-

mittee to which it was finally referred. Patently we may not now attribute to the Legislature an accidental or unintentional omission to include the exception contended for by the defendants and necessary to place them outside the operation of the statutes. Rejection by the Legislature of a specific provision is most persuasive that the act should not be construed to include it. *Pennsylvania R. Co. v. International Coal Mining Co.*, 230 U.S. 184, 198, 33 Sup. Ct. 893." *State v. Nelson*, supra, 417.

In an exhaustive opinion the Court proceeds to discuss the other issues and concluded that the statute is constitutional and not in violation of the Fourteenth Amendment of the United States Constitution, and that in view of the language of the statute there are no exceptions permitted.

In 1942 our Supreme Court of Errors considered the constitutionality of the statutes in the case of *Tileston v. Ullman, State's Attorney et al*, cited supra. This was an action for a declaratory judgment quite similar to the present proceedings and was presented before the Supreme Court of Errors on a stipulation as to facts. Connecticut Supreme Court Records and Briefs, February Term 1942, A-172, Page 425.

Dr. Tileston petitioned the Court for a judgment declaring whether the designated statutes made it unlawful for him to prescribe the use of contraceptive devices for married women living with their husbands when the doctor in the exercise of his professional judgment was of the opinion that contraceptive measures should be prescribed because future pregnancies would have a serious effect upon the patients' general health and might result in permanent disability.

The Court in its opinion, page 94, stated that when the "legislature expresses the will of the people in a statutory enactment the language of which is plain and unambiguous,

the law must stand unless it is clearly unconstitutional or unless it is plain that the legislature must have intended an exception which it did not express. Birth control is a highly controversial subject. Social thinking is divergent. It finds frequent expression at legislative hearings. Then the legislature speaks. In the statute now under consideration it has infringed upon what a large body of intelligent citizens believe are their natural rights and privileges. The answer is that ' "The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority . . . essential to the safety, health, peace, good order and morals of the community." ' The Supreme Court of the United States in *Jacobson v. Massachusetts,* supra, 26. (197 U.S. 11; 25 S.Ct. 358).

"The argument presented to the legislature is moral, physiological, sociological. The questions presented to us in this case are wholly legal . . ."

Tileston v. Ullman, State's Attorney et al, was subsequently appealed to this Court, 318 U.S. 44; 63 S.Ct. 493. The Court dismissed the appeal on the ground that the proceedings of the State Court presented no constitutional questions which appellant had standing to assert, in that his patients were not parties to the proceedings and there was no basis on which the appellant could secure an adjudication of his patients' right to life since they did not assert such claim in their own behalf.

The opinion of the Supreme Court of Errors of Connecticut in the instant case points out that since the Tileston decision in 1942 the Connecticut General Assembly has at every Session refused to amend the statutes so as to allow physicians to prescribe the use of contraceptive measures (R. pp. 30, 31, 32, Note 2).

The Court also mentioned the fact that two complete revisions of the General Statutes have been approved by the General Assembly and that the statutes in question have been left unchanged.

The 1959 Session of the Connecticut General Assembly, in approving the 1958 Revision of the Connecticut statutes, adopted Public Act No. 3, which is as follows:

> "Section 1. The general statutes of the state, as corrected, revised, arranged, incorporated and published under the title, 'General Statutes of Connecticut, Revision of 1958', by the legislative commissioner under the provisions of number 605 of the special acts of 1957, are adopted, ratified, confirmed and enacted.
>
> "Sec. 2. This act shall take effect on January 15, 1959."

The defendant filed demurrers in each of the three cases on the ground that the issues presented by the plaintiffs' complaint had been previously conclusively determined by the Connecticut Supreme Court of Errors (R.p. 14).

The Court in its opinion sustained the demurrers on the ground that the rights and jural relations of the parties in the situation of these plaintiffs had been conclusively determined by previous decisions of this Court (Opinion, R.p. 26).

In the face of the legislative history as noted by the Connecticut Supreme Court of Errors, it is evident that the Connecticut General Assembly was aware of the opposing theories regarding artificial birth control. This being so, the Connecticut Legislature had to make a choice as between two divergent views, and chose not to permit exceptions to the statute as originally enacted in 1879. "The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed." (Opinion, R.p. 33).

The appellants indicate in their argument that proposed amendments to the statute have been and are being opposed by a minority of the electorate. This is pure assumption and has no basis upon which this Court may rely, particularly in view of the legislative history of Section 53-32.

As indicated in *Tileston v. Ullman*, supra, 87, this statute was originally enacted in 1879. At practically every Session since 1923, opponents of this legislation have attempted to modify this legislation either by repeal or amendments. In each instance the Legisature has refused to make any changes in the statute. Under these circumstances it is inconceivable that successive Legislatures from 1923 through 1959 were not speaking the will of the majority of the citizens of Connecticut.

Statutes forbidding or regulating the sale or advertisement of contraceptives or dissemination of birth control information have uniformly been held to be constitutional. 113 A.L.R. 970.

The purpose of such statutes was clearly stated by the Court in *Commonwealth vs. Allison* (1917) 227 Mass. 57; 116 N.E. 265, at page 266:

> "'Manifestly they are designed to promote the public morals and in a broad sense the public health and safety. Their plain purpose is to protect purity, to preserve chastity, to encourage continence and self-restraint, to defend the sanctity of the home, and thus to engender in the state and nation a virile and virtuous race of men and women. The subject matter is well within one of the most obvious and necessary branches of the police power of the state . . . It has been argued that these pamphlets were designed to propogate what is termed "birth control". Whatever may be said about that subject, it is too man-

ifest for discussion that prohibition of the acts described in the statutes . . . is within the power of the general court.' "

POINT II

A.

It is claimed that the State in forbidding the use of artificial means to prevent conception thereby deprives married people of personal liberty within the intent of the Fourteenth Amendment of the Constitution of the United States. Liberty within the meaning of the Constitution has not been defined with any great precision. This Court has said that "Liberty under law extends to the full range of conduct which the individual is free to pursue and it cannot be restricted except for a proper governmental objective." *Bolling et al v. Sharpe et al.* 347 U.S. 497; 74 S.Ct. 693 (1954).

It is obvious that the Constitution does not mean that individuals have the right to total liberty for that would mean license and chaos and tend to develop an irresponsible citizenry.

The issue, then, is to what extent may individuals be restrained by legislative enactments. When moral and welfare issues are involved, a State has great latitude, and that a State has direct responsibility over the morals and welfare of its people cannot be seriously questioned. State Legislatures have, in many instances, passed laws in the moral field which result in curtailing the range of conduct permitted to an individual.

As the Connecticut Supreme Court of Errors stated in *State v. Nelson*, supra, 424, "As to a contention that the statute unconstitutionally 'interferes with the free exercise of conscience and the pursuit of happiness' it is noted in *People*

v. Byrne (163 N.Y.S. 682) 687, that a like claim could be made with no more force as to statutes prohibiting adultery, or fornication, or any one of many other crimes."

Some other areas where statutes curtail freedom of conduct are, for example, horse race betting, gambling, lotteries, etc. "Conduct of the individual is subject to such direction and restraint as the public good requires." *State v. Nelson*, supra, 424. Where there are controversial views on such subjects, the public policy of a State is to be determined by the Legislature and not the Courts. *Jacobson v. Commonwealth of Massachusetts*, 25 S.Ct. 358, 197 U.S. 11; *State v. Nelson*, supra; *Tileston v. Ullman*, supra.

The Connecticut Supreme Court of Errors has now considered the issues presented on three different occasions. In addition, there is now pending in the Connecticut Supreme Court of Errors the case of *David M. Trubek, et al v. Abraham S. Ullman, State's Attorney* (Argued October 6, 1960). The plaintiffs are husband and wife, aged 23 years and 21 years respectively, both being students at Yale Law School. It is alleged that they wish to have a family but first wish "to have an opportunity to adjust themselves, mentally, spiritually and physically to each other, so as to establish a secure and permanent marriage before they become parents. In addition, both husband and wife are students and a pregnancy at this time would mean disruption of Mrs. Trubek's professional education." *Trubek v. Ullman*, Supreme Court of Errors of Connecticut, R., p. 2.

When two people marry, individual liberty is necessarily curtailed. The State and society expects that the parties will, as a result of voluntarily entering the marital status, carry out the duties and obligations required of such a relationship.

"Marriage creates contractual obligations between man and woman of the most sacred and enduring nature. It is

the basis of the family and the home and is therefore an institution upon which rests our whole way of life. For these cogent reasons the State has a very real and vital interest in the maintenance of the marriage bond."

Casale v. Casale, 138 Conn. 490 at 492.

"Marriage is a consentient covenant. It is a contract in the sense that it is entered into by agreement of the parties. But it is more than a civil contract between them, subject to their will and pleasure in respect of effects, continuance, or dissolution. It is a domestic relation having to do with the morals and civilization of a people. It is an essential institution in every well organized society. It affects in a vital manner public welfare, and its control and regulation is a matter of domestic concern within each state."

Stevens v. United States, 146 F. 2d 120 at 123.

"It well at this point to clearly understand what a marriage relationship should mean to persons who assume this sacred responsibility. Marriage carries with it definite obligations and responsibilities. It is that act by which a man and woman unite for life with the intent to discharge toward society and one another those duties which result from the relation of husband and wife. It is frequently said in this country that marriage is nothing more than a civil contract. . . . But this agreement differs essentially from all others. This contract of the parties is simply to enter into a certain status or relation. The rights and obligations of that status are fixed by society in accordance with the principles of natural law, and are beyond and above the parties themselves."

Rich v. Rich, 171 A. 515 at 517; N.J. 1934.

Thus, since marriage so affects the morals and civilization of a people, its control and regulation is a matter of domestic concern within each State. The rights and obligations of marriage are over and above the parties themselves and are fixed by society in accordance with the natural law.

As stated by our Connecticut Courts, birth control is a "highly controversial subject", *Tileston v. Ullman*, supra, 94, and after hearings by many different legislatures from 1923 through 1959, each legislature has in effect affirmed the original statute forbidding the use of drugs, medicinal articles or instruments for the purpose of preventing conception.

In enacting such legislation, it is not necessary that the purpose be expressly stated and Courts cannot assume that such legislation was adopted arbitrarily or without good reason to further some legitimate policy of the State. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522; 79 S.Ct. 437.

Every possible presumption exists in favor of the validity of a statute and this continues until the contrary is shown beyond a rational doubt. *Powell v. Commonwealth of Penn.*, 127 U.S. 678; 8 S.Ct. 992 (1888); *Everard's Breweries v. Day*, 265 U.S. 545; 44 S.Ct. 628 (1925).

B.

It is alleged that appellant Buxton is prohibited from practicing his profession and he is thereby deprived of liberty and property without due process of law.

The statutes must of necessity apply only to a small facet of Dr. Buxton's professional practice.

As previously seen "Birth control is a highly controversial subject". *Tileston v. Ullman*, supra, 94. Under such circumstances it is for the Legislature to establish the public policy

of the State. Further, if there are two or more remedies available in a given situation again it is for the Legislature to make the decision as to the choice of remedy, and there is no obligation that the most modern or scientific remedy be chosen.

In this instance, Connecticut, under its police power, has stated that the use of artificial contraceptives may not be used to prevent conception. The fact that this policy may deprive some physician of fees because he does not agree with the statute and wishes to prescribe that which is forbidden does not thereby mean that said physician is deprived of liberty or property without due process of law. "There is no right to practice medicine which is not subordinate to the police power the states". *Lambert v. Yellowley*, 272 U.S. 581; 47 S.Ct. 210.

We should also point out that appellant Buxton's claim as to loss of liberty and property is on the same footing as the appellants Poe and Doe. If the statute, Section 53-32 of the General Statutes, Revision of 1958, is a valid exercise of the police power of the State as to Poe and Doe, then anyone who aids or counsels a violation thereof obviously does not acquire any property rights.

POINT III

For the most part the appellants' argument is sociological and physiological rather than legal. They cite at great length various authorities and tables to the effect that artificial means of conception is more effective than any other method.

These same arguments have been presented many times at legislative hearings. At these hearings there have always been presented contrary opinions by eminent medical authorities. It is our view that on the basis of the record, much of the material presented by the appellants is not within the purview of the issues presented to this Court. Our Supreme Court has

already found that "Birth control is a highly controversial subject. Social thinking is divergent. It finds frequent expression at legislative hearings". *Tileston v. Ullman*, supra, 94.

In its opinion in the instant case the Connecticut Supreme Court of Errors has again pointed out that since the Tileston decision the General Assembly has "consistently refused to amend the statutes so as allow physicians to prescribe the use of contraceptive measures" (R.p. 30).

It would be expected in view of the claims of the appellants that Connecticut might have a high maternal mortality rate inasmuch as the use of artificial contraceptives is not permitted even on facts as outlined in their complaints. However, the facts are exactly contrary since Connecticut has one of the lowest maternal mortality rates in the United States.

The statistics relating to maternal mortality sustain these conclusions, to the effect that "pregnancy control" and not "birth control" is the essential factor in preserving the life and health of pregnant women.

In a five-year study of maternal mortality in Connecticut for the years 1946-1950, inclusive, Dr. Carl E. Johnson indicated that maternal mortalities for Connecticut have dropped more than 90% between 1926 and 1950. The State and National rates have followed approximately the same downward trend with Connecticut in the lead. During a period from 1946 to 1950 there were a total of 139 maternal deaths.[1]

Maternal mortality from 1951 to 1955 has shown corresponding decreases in maternal mortality in that there were only 75 deaths during this five-year period.[2]

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[1] A Five Year Study of Maternal Mortality and Morbidity in Connecticut—1946-1950, Inclusive. Carl E. Johnson, M.D., New Haven

[2] Maternal Mortality in Connecticut, 1951-1955, Page 2. Reprinted from Connecticut Medicine—Dec. 1959 Issue, Vol. XXIII, No. 12, Page 772

As noted from the following chart,[3] 60% of the 75 deaths occurring during the period 1951 to 1955 might have been prevented:

CORRELATION OF PREVENTABILITY AND NON-PREVENTABILITY IN MATERNAL MORTALITY CONNECTICUT 1951 - 1955

Cause of Death	No. of Patients	Preventable M.D. & Others		Preventable Patient		Total Preventable	
All Causes	75	37	(49.3%)	8	(10.7%)	45	(60%)
Infection	11	7	(64%)	3	(27%)	10	(91%)
Toxemia	10	6	(60%)	2	(20%)	8	(80%)
Hemorrhage	15	11	(73%)	2	(13%)	13	(86%)
Other Causes	39	13	(30%)	1	(3%)	14	(33%)

In view of these statistics it is our claim that maternal mortality in Connecticut is fast aproaching an irreducible minimum and that there is no urgent medical need for married women to resort to artificial contraceptives for the purpose of preventing conception for health reasons.

As a matter of fact, this view was substantiated in a recent article[4] advocating relaxation of state laws concerning abortion and featuring Dr. Alan F. Guttmacher, chairman of the national medical committee of the Planned Parenthood Federation of America and director of the Margaret Sanger Research Bureau, wherein it was stated that "the requirements for legal abortions in U.S. hospitals have changed drastically in the last twenty years. As late as 1940, the three chief

[3] Maternal Mortality in Connecticut, 1951-1955, Page 9.
[4] Newsweek, August 15, 1960, Page 50.

reasons for ending pregnancy to 'save the mother's life' were serious heart, lung, and kidney diseases. Today, with better techniques for treating these ailments during pregnancy, it is seldom necessary to abort the mother to save her life."

In their brief the appellants devote some 15 pages to the science of demography (Brief pp. 45-60).

We respectfully submit that these arguments cannot aid this Court in a determination of the issues presented upon the record. Under the United States Constitution there is reserved to the States the right to enact legislation which is deemed by the Legislature to promote the morals and welfare of its people.

So far as Section 53-32 of the General Statutes, Revision of 1958, is concerned, it seems obvious that the Connecticut Legislature, speaking for the people of Connecticut, believes that the indiscriminate use of contraceptives will have an eroding effect upon the moral standards of its people.

Again, the appellants make the amazing claim that artificial devices to prevent conception are available in Connecticut to unmarried persons. Such claim overlooks Section 53-219 of the General Statutes, Revision of 1958, wherein fornication or lascivious carriage or behavior is made a crime.

At page 17 of the Brief, a portion of a letter by the then State Commissioner of Food and Drugs is quoted to substantiate their claim regarding the sale of contraceptive devices. The letter referred to is not based upon any legal authorty, and, at most, represents the personal views of the then Commissioner.

As is evidenced by t. following, the present Commissioner does not share the views quoted by the appellants: "Please be advised that this office is not responsible for or

agreed with what might have been the opionion of the Commissioner of Food and Drugs of that date".[5]

As previously indicated, the appellants claim that the views set forth in their Brief represent the opinion of the majority in the State of Connecticut. When elected representatives year after year adopt a standard of legislation designed to promote the public good, welfare and morals, who can gainsay that such action does not represent the majority will of the people.

Until the contrary is shown by positive incontrovertible proof, this Court must assume that successive action by each Legislature must reflect the choice of the majority of the electorate. Any other concept would be contrary to our basic philosophy of democratic government.

POINT IV

CONCLUSION

The judgment of the Supreme Court of Errors of Connecticut should be affirmed.

Respectfully submitted,

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[5] Letter of Commissioner Frassinelli, dated June 30, 1960, to Fowler V. Harper